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THE CASE OF THE SOUTH CAROLINA STATE CANVASSERS.

In framing a constitution for the protection of free institutions in this country the statesmen who were called to the task found it necessary to devise an apportionment of the powers of sovereignty between the state jurisdiction on the one hand and the federal jurisdiction on the other, and as the best practicable arrangement which could be agreed upon, they assigned to the latter certain powers particularly specified, leaving the others to the states: *United States* v. *Fisher*, 2 Cranch 358; *Golden* v. *Prince*, 3 Wash. C. C. 313; *Ableman* v. *Booth*, 21 How. 506; *Gilman* v. *Philadelphia*, 3 Wall. 713. Each jurisdiction is fully equipped with executive, legislative and judicial officers, and each is expected to move within its assigned sphere without let or hindrance from the other: *McCulloch* v. *Maryland*, 4 Wheat. 316; *Ableman* v. *Booth*, *supra*. But just as an invasion of the jurisdiction of one government by another when their division is by territorial lines would be likely to lead to irritation, the disturbance of friendly relations and at last to war, so here the invasion of jurisdiction where the dividing line is different, has an inevitable tendency to breed irritation and civil dissensions, and to disturb the bonds of union, and continued encroachment must necessarily either work a gradual revolution, or entirely break up the government. It therefore becomes the solemn duty of every patriotic citizen when

such an encroachment takes place to enter vigorous protest, and if possible to make the protest so emphatic that it shall be heard and felt, in order that, to the full extent of his powers, he may assist in preventing the like encroachments in the future. And this duty is especially incumbent on the legal profession where the encroachment is ventured upon by judicial tribunals.

On the first Tuesday of November last an election took place in the state of South Carolina for state officers, members of the legislature, representatives in Congress, electors of president and vice-president, and county officers, and the result of the election was duly reported by the county and district managers to the state board of canvassers. By law this board consisted of H. E. Hayne, secretary of state, F. L. Cardozo, state treasurer, T. C. Dunn, controller-general, William Stone, attorney-general, and H. W. Purvis, adjutant and inspector-general.

Three of these persons, Hayne, Cardozo and Dunn, constituting a majority of the board, were candidates for re-election, and if they sat as members of the board, were to decide between themselves and their opponents. The board convened November 10th, for the purpose of canvassing the returns, and adjourned to the next day. Meantime an intense solicitude prevailed throughout the state regarding the probable result. It was known that the election was close, and the prevailing belief seemed to be that on the face of the returns the ticket opposed to that on which Hayne, Cardozo and Dunn were candidates had a majority, and that if the votes were declared as reported, that ticket, which we shall call the Hampton ticket, would be declared elected. But it also came to be generally known that the board of state canvassers claimed judicial powers, and that they were likely to reject certain returns which gave considerable majorities against their party, and thereby elect candidates who on the face of the returns would appear to be defeated. The political complexion of the legislature would be changed by this process if resorted to, and it thus appeared that the whole political machinery of the state for the next two years was likely to depend upon the proposed action. As a majority of the board of canvassers were directly interested in the result, and might, if judicial powers were conceded to them, elect themselves by the mere exercise of the will to do so, it was not unreasonable to suppose that upon the determination of the question whether their powers were judicial, or on the other hand ministerial only, would depend the final count. Acting in this belief,

the candidates on the Hampton ticket appeared before the board by counsel and filed protests against any other than ministerial action, and against any member of the board whose case was to be passed upon sitting as a member. On the legal issue raised by these protests counsel were heard November 13th and the board adopted the following resolutions:—

"1. Resolved, that the board of state canvassers do not propose to canvass the returns of governor and lieutenant-governor, as it is of opinion that the determination of the election of those officers is given by the constitution to the General Assembly.

"2. Resolved, that the state board of canvassers have the right to hear protests as to the election of electors for president and vice-president, and members of Congress, and to give their certificate to such persons as have the highest number of votes.

"3. Resolved, that it is the opinion of the board of state canvassers, that the secretary of state, state treasurer and comptroller-general, have the right to sit as members of this board, to hear and determine all questions coming before them, except that neither of the said officers shall vote upon his own election."

Thereupon, the Supreme Court of the state being in session, R. M. Simms and his associates on the Hampton ticket presented to the court a petition, reciting the facts already stated and reciting further that the board of state canvassers were proceeding to hear and determine all matters of contest or protest before them in regard to the election of persons who were candidates for the several offices at the said election, and to certify their determination on such contests and protests to the secretary of state, and that the secretary of state was about to issue certified copies of such determination to the parties in whose favor such determination should be made; and praying that a writ of prohibition issue directed to the said secretary of state and to the several members of the board, prohibiting and forbidding the said board from exercising any judicial functions or duties whatever in regard to any protests or contests which had been or might be submitted to them touching said election, and from hearing and determining any such protests or contests, and from doing anything further than the ministerial acts of ascertaining from the managers' returns and the statements forwarded by the boards of county canvassers for the respective counties, the persons who had received the highest number of votes

for the offices for which they were candidates respectively, and declaring the same, and certifying such statements to the secretary of state; and restraining and prohibiting the said secretary of state from receiving or recording any certified statement or determination of the board in any case in which the board heard or determined any contest or protest, and from issuing to any person any copy of any certified statement or determination of the board in any case in which the board has heard or determined any protest, and from issuing any copy of any certified statement of the board to any person who had not received, according to the managers' returns and the statements forwarded by the boards of county canvassers the greatest number of votes cast for the office for which he was a candidate. The petition also prayed that the relators might have such other and further relief, and such other and further original and remedial writs as might be necessary to the supervisory control by the court of the said board of state canvassers in furtherance of justice and to the protection of the relators.

On presentation of this petition order was taken that the suggestions therein be heard and considered as separate suggestions; the one praying for the writ of prohibition only, and the other praying for the writ of mandamus only. Also, a rule that the members of the board and the secretary of state show cause on the 16th day of November instant, at 12.30 o'clock P. M., why a writ of prohibition should not issue as prayed. The counsel for the relators at the same time asked an *ad interim* restraining order as a part of the rule to show cause, but this the court declined, stating that the rule itself operated as a restraint, and that it was not to be supposed that the board would proceed, and it would be a high contempt of court to do so. On the same day the board of canvassers adopted a resolution, that "the board will not act upon any proposition until the question of its powers and duties be decided by the Supreme Court."

November 16th the relators filed their return in which they set out in detail the grounds on which they relied in claiming judicial powers. Upon this return the questions in dispute were argued at length by counsel. On the next day without reaching any final judgment on the matters submitted in argument the day before, the court passed the following order: "It is ordered in the above entitled cause, that the board of state canvassers, consisting of H. E. Hayne, secretary of state, as chairman, and F. L. Cardozo

treasurer, T. C. Dunn, comptroller-general, William Stone, attorney-general, and H. W. Purvis, adjutant and inspector-general, do forthwith proceed to aggregate the statements forwarded to them by the board of county canvassers, and ascertain the persons who have received the greatest number of votes for the offices for which they were candidates respectively at the general election held in the state on the 7th inst., and certify their action in the premises under this order to the court.

"This order to apply to all officers voted for at said general election, except the offices of governor and lieutenant-governor, which are not in question by the pleadings." This order, it will be seen, required a mere report from the face of the returns, but not any final action.

November 21st the board filed with the court a report in which they give in detail a statement of the votes cast in the several counties as shown by the returns of the county canvassers, for the offices of elector of president and vice-president, secretary of state, attorney-general, state treasurer, controller-general, superintendent of education, members of Congress, members of the General Assembly, senators and county officers. According to this report there would be elected to the General Assembly a majority of those who were candidates on the Hampton ticket. In making their report the board refer to protests regarding the election in Edgefield, Barnwell and Lawrence counties, and evidences and allegations of fraud and of protests and notices of contests from other counties, and say that in view of these they cannot properly ascertain and certify who have actually received the greater number of legal votes in such counties for the several offices voted for unless they have the opportunity of investigating the allegations and hearing evidence on the protests.

On filing this report the following rule was entered: "It appearing from an inspection of the above stated petition for mandamus that the same relates to different classes of officers, to wit, of members of the General Assembly, of electors for president and vice-president of the United States, of members of Congress of the United States, of circuit solicitors, of county officers, and it appearing to the satisfaction of the court that there are, or may be shown to be, different provisions or rules of law applicable to these several classes of officers, and that the emergency of time may render necessary and proper a priority in the order in which the court

shall pass upon the questions of law relating and applicable to these different classes of officers respectively :—

" *Ordered*, that the petition herein be considered and determined by the court, as if several separate petitions had been filed herein, one each in the several above specified different classes of officers. November 21st 1876."

At the date of this action the time for the meeting of the General Assembly was only seven days distant, and the result of the election for members was not yet ascertained and declared. The necessity for immediate action was consequently very great, and this was pressed upon the attention of the court. The court, therefore, ordered the case made by the petition, so far as related to the members of the General Assembly, to be at once taken up, and it was proceeded with and discussed. At the opening of the court on the next morning the following opinion was announced by the chief justice :—

" The necessity of an immediate decision prevents, for the present, any extended views of the court on the question submitted for its determination, neither does it propose now to declare its views of the extent or the character of the powers of the board of state canvassers, except so far as they relate to the election of members of the General Assembly.

" The Constitution, by the 14th section of the second article, declares that each house shall judge of the election, return, and qualification of its own members. It was necessary, therefore, for the organization of each house, that a mode should be provided, through which the choice of the electors might be made known, so far as it primarily appeared from the evidence, which the statutes required should be submitted to them. Without some such mode of ascertaining in the first instance the probable will of the constituencies, there could be no organization of either house. It is not intended by the authority conferred on the state board to delegate to it any of the power vested by the Constitution in each house, but merely to provide a mode and manner which was deemed the most reliable and effective in ascertaining in each county the will of the people expressed through the ballot box as to the offices to be filled by the election. The machinery by which the proposed end was to be met, was through the appointment of precinct managers, boards of county canvassers and the board of state canvassers. The several 'statements' submitted to the last

named board, as required by the act, provided the means not of 'judging of the election, return and qualifications of the members of either house;' but of ascertaining who, according to the mode by which the fact was to be established were entitled to the certificates; not to show the *election* in the terms of the Constitution, but the apparent choice of the people as expressed in the 'statements;' and this conclusion was to be reached by the evidence of the number of votes cast, and of the parties in whose favor the greatest number of votes were given, for the senate or house, as the case might be. It was not competent for the board to determine, as the house only could, who, in fact, was the chosen member; for the extent of their means to that end were not commensurate with that of the house. One averring against the seat of another, who is admitted by the possession of the certificate, does not assert his right by way of appeal from the action of the board, but asks the intervention of the house by force of its inherent and original jurisdiction. The board of state canvassers having certified to this court the number of votes given in the various counties for members of the General Assembly, now, in accordance with the views above expressed—

"*It is ordered*, that a writ of peremptory mandamus do issue, directed to the chairman and members of the board of state canvassers and the secretary of state, commanding the said board forthwith to declare duly elected to the offices of senators and members of the House of Representatives, the persons who by said certificate of the said board to this court have received the greatest number of votes therefor, and do forthwith deliver a certified statement and declaration thereof to the secretary of state; and commanding the secretary of state to make the proper record thereof in his office, and without delay transmit a copy thereof, under seal of his office, to each person thereby declared to be elected, and a like copy to the governor, and cause a copy thereof to be printed in one or more public newspapers of this state."

This opinion was announced and the order made in open court in the presence of counsel for both parties. A recess having been taken for dinner, the counsel for the relators on the re-assembling of the court, moved to proceed upon a separate suggestion regarding the case of electors of president and vice president; the counsel for the respondents requested further time, and it was granted by the court. At this very time, however, as it subsequently appeared,

the board had adjourned *sine die;* having first held a meeting without the knowledge of the relators, at which they declared Hayne and his associates on the ticket and a majority of the candidates for the Assembly on the same ticket duly elected. They had also at the same meeting determined that the candidates for electors on their ticket were chosen, and announced the result on members of Congress. In reaching their conclusions they had made free use of judicial powers, and had rejected certain returns. November 23d Hayne made return to the writ of mandamus, the substance of which is embraced in the following: "That having fully completed their labors and performed their duties in the premises, a motion was, on Wednesday, the 22d instant, regularly made and carried that the said board adjourn *sine die*, and thereupon the said board accordingly adjourned at the hour of 12.48 P. M. of said day; and at the time of the order of said court in this case, and of the service thereof on this defendant, the board had ceased to exist. He therefore respectfully submits that no further proceedings or action can be taken by him as a member of said board, and that in view of its dissolution, a peremptory mandamus would be unavailing and cannot properly be allowed."

On the next day (Nov. 24th) the relators filed a statement setting forth the facts, and submitted it to the determination of the court. Thereupon a rule was entered that the members of the board show cause at 4 o'clock P. M. of that day why each should not be attached "for contempt of this court, as shown by the record of the proceedings of the board of state canvassers, taken on the 22d day of November 1876, after the judgment of this court had been filed, and by his failure to obey the mandate of this court." This having been served and a hearing had, orders were entered of which we give the one in the case of Hayne. "The relators in the above cause having filed their suggestion in this court on the 14th day of November 1876, praying, among other things, that the said respondents might be commanded by this court to perform their duties as state canvassers according to law; and the said respondents having answered thereto and the duties and powers of the board of state canvassers having been submitted to this court and argument heard thereon; and the said respondents having adopted their resolution, that this board will not act upon any proposition until the question of its powers and duties be decided by the Supreme Court; which said resolution was duly filed as an ex-

hibit in this cause; and the said board of state canvassers having, in obedience to an order of this court, made their certified report to this court, setting forth the persons who had received the highest number of votes for the offices for which they were respectively candidates at the general election held in this state on the 7th instant, and this court having, on the 22d day of November 1876, made its order that a writ of mandamus do issue, directed to the said respondents, commanding the said board of state canvassers forthwith to declare duly elected to the offices of senator and members of the House of Representatives the persons who, by the certificate of the said board of state canvassers to the said court had received the greatest number of votes therefor, and forthwith to deliver a certified statement and declaration thereof to the secretary of state, and commanding the secretary of state to make the proper record thereof in his office, and without delay transmit a copy thereof under the seal of his office to each person thereby declared to be elected, and a like copy to the governor, and cause a copy thereof to be printed in one or more public newspapers of this state;

"And the said board of state canvassers having on the 22d of November, and while this court was in session, met and made their other certified statement of the persons who had received the greatest number of votes for members of the Senate, and members of the House of Representatives, from the several counties, and declared the same duly elected, and delivered said certified statement and declaration to the secretary of state; but the said board of state canvassers refused to certify and declare as elected the persons who had received the greatest number of votes for members of the Senate, and members of the House from the counties of Edgefield and Laurens, and adjourned *sine die;*

"And this court, in pursuance of its order, dated the 22d day of November, having issued its writ of mandamus, directed to the said respondents, commanding them to do and perform the matters and things hereinbefore set forth in their said order and to make known to said court, forthwith, how they, the said respondents, executed said writ;

"And said writ, having been duly served upon the said respondents, and the said respondents having failed to obey the mandate of this court expressed in said writ, and having failed to make any return to said writ, showing their performance and execution of

the mandate of this court, or good and sufficient cause why the same had not been done; and thereupon a rule having issued from this court, on the 24th day of November, directing the said respondents to show cause why they should not be attached for contempt in not obeying said mandate of the court; and said rule having been served on the said respondents, and the said respondents having appeared in court in answer to said rule, and having failed to make any return thereto, or to show any good and sufficient reason why they had not obeyed and executed the mandate of this court;

"*It is now adjudged*, That the said H. E. Hayne is in contempt of this court, and *it is ordered*, that he do pay a fine of $1500, and that the sheriff of Richland county do take him, the said H. E. Hayne into custody, and confine him in the common jail of said county until he be discharged by order of this court."

This order was duly enforced by the arrest and imprisonment of the parties condemned thereby.

It has been necessary to state these proceedings with particularity in order that we may understand and appreciate the legal bearings of the proceedings before Judge BOND, of the United States Circuit Court, which begin at this point. Calling attention to the fact that the mandamus had required of the members of the board nothing beyond the declaring elected the candidates for seats in the General Assembly having an apparent majority, and the certifying and recording of the result, and that the action of the board in declaring the result so far as concerned electors of president and vice-president and members of Congress, was in no way called in question either by the mandamus or the order to punish the members for contempt, we pass to the petition for the writ of habeas corpus which was now presented to Judge BOND, on behalf of the parties so adjudged in contempt.

It is not important to give this petition in full. In order to give color of jurisdiction to the federal judge, it was, of course, necessary to set out a case constituting *primâ facie* an invasion by the state court of the federal jurisdiction. By way of doing this the petitioners proceed to show that they are canvassers not only of the votes for state and county officers and members of the General Assembly, but also for members of Congress and electors of president and vice-president; and they assert "that in canvassing the returns of said election for members of Congress and for electors

of president and vice-president, and determining and declaring and certifying the result thereof, your petitioners were compelled to canvass and declare the election for all the state and other officers voted for at said election, except the governor and lieutenant-governor, not only by reason of their duties as defined by the laws of said state, in respect to such state officers, but also by reason of the fact that the returns of all the persons voted for, and all other papers and evidences pertaining to said election, and within the custody and jurisdiction of the board of state canvassers covered and embraced the entire election, and was therefore necessarily blended and commingled as one general whole." This is the pith of the whole petition, and the basis of the conclusion which the petitioners draw that "they are in custody and confinement and restrained of their liberty for acts done in pursuance of the laws of the United States, and that they are in custody in violation of the Constitution of the United States."

If this petition had not been sustained as sufficient, by a judge presumably learned and logical, we should have supposed it safe to assert that the case it made was not even plausible. What it necessarily undertook to make out was that the relators were being punished for something done by them in pursuance of the laws of the United States. What they were being actually punished for, as the petition showed, was for disobedience to the mandate of the court regarding the canvassing and certifying the election of members to the state legislature. With this the laws of the United States confessedly had nothing to do. But to give color for interference the petitioners say that the returns for members of the General Assembly are necessarily "blended and commingled" with those for electors and members of Congress; wherefore they suggest the inference that they could not be separately canvassed. The suggestion has no plausibility. As well might a judge when commanded by an appellate tribunal to enter an order in a certain case object that the case was "blended and commingled" with others on his docket, and he must deal with his docket as "one general whole." As well might a board of supervisors make a like return when required by mandamus to allow and provide for a certain one out of a batch of accounts. When the returns of election in respect to several offices are made on one sheet by the local managers, the canvass by the state board as to each office, so far as concerns the ministerial action in aggregating the votes and declaring the result

is always in fact and in law a separate act. If for convenience in reaching the result, the votes as to all are brought into one table, it is still true that the canvass as to each office is separate. Indeed it could not possibly be otherwise. And it must be borne in mind constantly that it was this ministerial act that the court had required; nothing more.

But the board claimed by their petition that it was their duty to do something more than this; to go behind the returns and decide upon the validity of elections in particular districts; and that in doing so as to members of the General Assembly they necessarily did so as to electors and members of Congress. Assuming that their view of their duty in that regard was correct, it is sufficient to say that the court thought otherwise, and that in obeying its order to canvass and declare the result on members of the legislature they would not in any manner have passed upon the validity or invalidity of any election. Notwithstanding that action they would still have been at liberty to exercise any "judicial powers" they possessed as regards the offices of electors and members of Congress. The claim of judicial powers as to those offices was therefore wholly irrelevant. But let it be admitted that the board were correct in claiming those powers as to all the offices voted for, and that the members were being punished for illegally exercising them in respect to members of the General Assembly; it is still true that this would not legally concern the federal court, and could not constitute an invasion of federal jurisdiction. Admit that what would make void the state election would make void the election for representatives in Congress and electors, still it only comes to this, that in each case the same question is involved, and arises on the same state of facts. But this often happens in legal proceedings, without any inseparable "blending and intermingling" of the cases, and curiously enough arose before this very board, and was dealt with by the members apparently without any embarrassment. It has already been stated that Hayne, Cardozo and Dunn, constituting a majority of the board, were candidates for re-election and their cases were to be passed upon. Now it is a fundamental principle that a man shall not be judge in his own cause; how then are their cases to be passed upon? Why, by the simple expedient agreed upon by formal vote, of Mr. Hayne standing aside while his case was passed upon; Mr. Cardozo doing the same in his case, and Mr. Dunn in his; thus each, though the

returns as to all were necessarily "blended and commingled" having his case passed upon separately, without embarrassment, and much to his satisfaction; though by voting on the case of his associates and rejecting returns to elect them, he necessarily passed upon the question which must rule his own case. How transparent then the pretence that cases of different offices could not be considered separately.

The federal judge, however, assumed that the petition showed a *primâ facie* case for his interference, and thereupon ordered a writ of habeas corpus to issue, returnable immediately. Had the subsequent proceedings been different this order might have been attributed to a conscientious desire to have any possible question affecting the liberty of the citizen carefully presented and argued, and might have been excused on the ground that, though the petition when closely examined manifestly made out no case, it was sufficiently plausible at first blush to justify a judge in giving counsel an opportunity to speak in its support. But the subsequent proceedings we venture to say were among the most extraordinary that ever took place before any judge of respectable position in this country; and though in the midst of the great political excitement that has since existed, they have been passed by with little notice, we should be recreant to duty if we failed to call such attention to them as shall enable the lover of liberty and the believer in law to comprehend their real nature and tendency.

The writ of habeas corpus was issued November 27th. It will be remembered that the relators were in confinement for the refusal to perform the ministerial duty of canvassing, declaring and certifying the result of the election for members of the General Assembly according to the returns made to them. The time appointed for the meeting of the General Assembly was the next day, the 28th. Confinement in all such cases has for its chief object to compel obedience to the order of the court; and whatever might be the conclusion of the federal judge on the application of the relators for a release, this object would be wholly defeated unless the case were immediately considered and disposed of. To postpone a hearing and decision would effectually defeat the chief purpose of the proceedings in the state court, even though it should subsequently be decided that the federal court had no jurisdiction, or that the state court was correct in the view taken of the duties of the canvassers. Yet this was exactly what was done by the federal judge. When the rela-

tors were brought up, although they were in confinement under a sentence presumptively valid and lawful, and entitled to respect as such, they were at once put in the nominal custody of the United States marshal, but allowed to go at large as though the sentence were presumptively illegal and void. We shall not question the power of a judge to take bail pending a hearing before him, but when the proceeding attacks the jurisdiction of a court of co-ordinate authority in passing final judgment, it is, to say the very least, a case in which ordinary courtesy as between the tribunals would require that the sentence be interfered with with hesitation, and not at all if its purpose, in case of a remand, would in any manner be embarrassed or prejudiced. But the course t ken here rendered it impossible for the state court under any circumstances to enforce obedience to its order. Without deciding anything the federal judge had given to his action the effect of a decision which paralyzed the authority of the state court. The members of the board of canvassers were thereby left at liberty to set the court at defiance, and to persevere in their course regarding the canvass which the Supreme Court of the state had declared illegal. The result we all know; for the next few days a petty military officer, without the pretence of civil authority, was the most important personage in South Carolina politics, and the laws were silent while he with a squad of men selected a legislature. We all know that for several days it seemed highly probable that dangerous commotions and possibly civil war might result from this high-handed act, and that the state was saved from it only by the extraordinary efforts of a few persons who fortunately were possessed of great influence with the people and great power over excited assemblages.

Of all these proceedings, which excited the whole country, and on which depended the rights of all the people of the state, and possibly the peace of the nation, the judge of the United States Circuit Court must be supposed to have been a calm spectator, occupied diligently in determining whether he had or had not jurisdiction to do what he had already done. The substantial purpose of the writ had been accomplished when the relators were set at liberty. The fines imposed upon them were insignificant when compared with the real matter in controversy, which concerned nothing less than the government of the state. The Supreme Court of the state had made its decision, and the issuance of the writ and the delay which followed had accomplished the purpose

of defeating their action, so far as related to the public questions covered by their decision, as effectually as if it had been set aside by some superior authority. To consider the question further with a view to determine whether the parties convicted of contempt should be punished, was to quarrel over non-essentials after the substance of the controversy had been appropriated. It may fairly be assumed that afterwards when the federal judge with apparent seriousness proceeded to consider the question of his jurisdiction, he contemplated with grim humor the case of the Delaware judge who, when a prisoner was sentenced to the whipping post, took care that the sentence should be carried into effect while the motion for a new trial was being argued. We cannot believe that this precedent was absent from the mind of the judge when he relieved the relators from confinement pending his consideration of the question of his right to consider the case at all, and at a time when his doing so would accomplish all the substantial purposes of an adjudication.

Nevertheless it was proper and decorous that a formal adjudication should be had, and this took place December 10th. It is impossible to refer the delay which had occurred to the difficulty of the question, or to laborious researches on the part of the judge in order to arrive at correct conclusions. The point of jurisdiction was very simple, and whether decided one way or the other, the deduction must be one of common sense rather than the result of profound reasoning. Nor does the decision bear on its face evidence of investigation. The judge takes the unusual course of appending to his opinion a note of authorities which he says he has "had occasion to refer to" in its preparation, but more than half of them are to points which nobody disputes, and in what manner the others support his deductions we are not informed.

In disposing of the application of the relators two questions might require to be passed upon: whether the federal court had jurisdiction to interfere in their behalf, and whether if it had, the proceedings of the state court were so far defective or unwarranted as to justify the discharge of the relators. The federal judge, after a few preliminary remarks, proceeds with his opinion by saying that "the first question to be decided at this time and upon this motion is, whether or not the Supreme Court of South Carolina had jurisdiction to hear and determine the matter before it." Now this seems a most extraordinary assertion. To the legal mind

nothing could be more preposterous. The question thus stated the judge could not decide at all unless he had jurisdiction to consider it; and what he should say concerning it would constitute a mere waste of words which nobody need heed and nobody would respect if, when the question of his jurisdiction came to be decided, it should turn out that he had no authority to pass upon it. Obviously and necessarily the first question to be decided was whether this judge himself had any jurisdiction to call in question the action of the state court: and to proceed to consider that action and condemn it, and then gravely go on to decide whether he had any authority to consider it, is such a reversal of the logical and proper course of proceeding that we are compelled to look further for a reason for considering first that which logically comes last if it comes at all.

And we think a reason is made apparent by the opinion of the judge. He had to deal with a case where the state court was proceeding to punish state canvassers for refusing to canvass the votes for state officers in the manner directed by the court. With such a proceeding obviously he had no concern. Considered by itself it was impossible to assert with any degree of plausibility that any question concerning federal jurisdiction was involved. The state court had by their writ of mandamus commanded their state officers to aggregate certain votes for certain other state officers and to declare and certify the result, and they had refused. This was all; and it was plainly a matter of merely state concern.

But by reversing the regular and logical course of proceeding a way was found of bringing into the case certain sophistical reasoning which might seem to give plausible support to the jurisdiction of the federal judge. How lame and halting is that reasoning will appear from the following extract from the opinion, which embodies the whole argument. "An examination of the laws of South Carolina will show that state and county officers are elected on the same day that electors of president and vice-president and representatives to Congress are voted for, and that they are voted for on the same general ticket, and that all ballots at the several precincts in each county are deposited in the same box, and are counted and returned by the same set of election officers, and the result of such election is certified to the board of state canvassers by the officers holding the election.

"And section 5514, title LXX., Revised Statutes of United

States, provides 'that any one who is proved to have voted at such general election shall be deemed to have voted for representatives in Congress.'

"The board of state canvassers is required to meet on the 10th day of November for the purpose of sifting, scrutinizing, not merely aggregating, the statements of the county boards. The validity of the entire election in a certain precinct or county depends upon a state of facts applicable to every officer, state or federal, who has been voted for on the general ticket at that particular precinct. So far as the laws of the United States are concerned, at an election where members of Congress are to be chosen, any alleged intimidation or violence toward the voter, or any other misdemeanor described in section 5511 of the Revised Statutes, would be a proper consideration for the board in determining the result; because such violations of the laws of the United States, if sufficient in degree in the judgment of the board of state canvassers would control the result.

"This is the law of South Carolina as applied concurrently with the paramount law of the land—the Acts of Congress made in pursuance of the Constitution of the United States.

"The board of state canvassers was not at liberty in canvassing the votes to shut its eyes to the laws of Congress respecting what was a fraudulent poll. In the petition the board alleges it was necessary, in canvassing the returns for federal officers at this general election, where both state and federal officers were voted for on the same ticket, to canvass all the votes polled and to declare the election of state officers after such canvass as well as federal officers, and it is manifest that to determine a general election, the amount of fraud and intimidation, if there was any exercised, to control the vote for state officers, must have had some influence upon the election of federal officers, and what the effect of it was upon such election it was for the board to determine."

The argument stated briefly is this: The canvassers were canvassers of the election of both state and federal offices. They were vested with discretionary and judicial powers. They therefore were not compelled merely to aggregate and report results shown by the returns, but might reject returns altogether. If they did so, their action would affect not state officers merely, but federal officers. *Therefore* the federal court had a right to interfere and protect them. Now the answer to all this has already been given.

The state court had not required the canvassers to exercise this judicial authority as regards the election of members of Congress and electors, nor forbidden its exercise. It had not in any manner interfered with it. Consistent with the mandamus issued by that court the board of state canvassers might proceed to reject returns so far as they bore upon the election of those officers, or they might refuse to do. The state court, in issuing its mandamus and in proceeding to punish for contempt had very carefully held aloof from any question involving the federal jurisdiction. When therefore the judge asserts that the board *might* lawfully do certain things which would affect the election of members of Congress and electors, and *therefore* the state court could not interfere with their action, and proceeds thence to the *therefore* that he might discharge these recusant officers, it is plain that he begins with a fallacy in order that he may deduce from it an unsound conclusion. What the board *might* have done which it would be unlawful to punish the members for, was of no moment. The judge himself correctly stated the question to be whether the relators were in custody for an act done or omitted in pursuance of a law of the United States, or in custody in violation of the Constitution of the United States; and no sophistry could conceal or mystify the fact that they were in custody for nothing but disobedience to a command of the state court relating exclusively to a matter of state law. If we accept the view expressed by the judge we may as well say, as in effect he does, that the board even in passing upon the election of state and county officers were acting under and were controlled and protected by the laws of Congress. This effectually removes them from state jurisdiction, and makes them for all practical purposes federal officers. Moreover the like logic would make every officer in the state a federal officer; for there is not an official act done by one of them that may not in some way, directly or remotely, affect a federal office, power or jurisdiction. This is inevitable under the system of government we have subscribed to and live under; the complicated nature of our government precludes its being otherwise. We thus reach, by a single dash of the judicial pen, a consolidated government.

But let it be admitted that in passing upon the election of members of the General Assembly the board necessarily passed upon the same questions which would be involved when the election for members of Congress came to be canvassed: what pretence of

authority does this give for interference so long as only the election for members of the General Assembly is being controlled? May John Doe interfere and enjoin the proceedings in a suit against Richard Roe because the same questions arise and must be passed upon in it which will arise in his own case standing next on the docket? Will not the court say to him that it will be time enough to consider the questions as they effect him when his own case is called for trial? On the judge's own reasoning what possible ground could there be for interference until the case of those officers was to be considered which he claimed must be passed upon under the laws of Congress? We repeat; the board had made the canvass as to those officers, and it had passed unchallenged by any order or decision of the state court. The court had ruled that the functions of the board were only ministerial, and though the board had held otherwise and proceeded to exercise that extraordinary species of *ex parte* arbitrary authority which has lately been dignified with the appellation "judicial," yet the court had not claimed or assumed a right to interfere afterwards except so far as concerned the election for members of the General Assembly. The validity or invalidity of any election for members of Congress, or for electors of president and vice-president would have been not in any manner disturbed or passed upon by the board in yielding obedience to the order of the court.

The federal judge discharged the relators, with expressions of regret at being compelled to differ with his "brethren of the state court" and with a declaration of his happiness "to think that this controversy may be referred to a tribunal whose judgment we all respect, the Supreme Court of the United States, and I shall be as little displeased as any one to hear that in this judgment I have been in error." That is to say, if at some future time, say two years or more hence, when the case can be reached in the Supreme Court, long after the parties who invited this usurpation of state authority have accomplished the purpose for which they sought it, the abstract question of whether he was right or wrong shall be decided against him, he will not regret it. No one could know better than this judge that the wrong done by his decision could not in any such way effectually be righted. If he were by his writ of habeas corpus to bring up all the convicts restrained of their liberty in the state penitentiary and by his order set them at liberty on the ground that some person therein was confined in viola-

tion of the Constitution of the United States, and that the cases of the others were so "blended and commingled" with that case that he would not distinguish them, it would be little consolation to an injured state that at some future time, after the convicts had been at liberty to prey for years on a suffering community, the Supreme Court would say to him, "Sir, you were in the wrong." But in order to be able to appreciate the remark of the judge at its true value, it should be stated that when counsel subsequently called his attention to it, and inquired in what manner a case thus heard at Chambers could be reviewed, he replied he was satisfied the statement was erroneous.

It seems almost unnecessary to remark that the mere fact that the state court was without jurisdiction did not authorize the federal judge to interfere. The federal courts have no jurisdiction to issue the writ of habeas corpus except in the cases provided by law: *Cabrera's Case*, 1 Wash. C. C. 232; *Dorr's Case*, 3 How. 103; *Metzger's Case*, 5 Id. 176; *Kaine, In re*, 14 Id. 103; *Milligan's Case*, 4 Wall. 2; *United States* v. *Rector*, 5 McLean 174; *United States* v. *Jailer of Fayette*, 2 Abb. (U. S.) 265; *Greathouse's Case*, Id. 382; *Parks' Case*, reported *ante*, p. 84; and no law of Congress has provided or could provide for interference except in cases where the federal jurisdiction is in some way involved. We need not enumerate the cases, which are provided for in detail. The federal judge did not claim that this was one, unless the relators were restrained of their liberty for an act done or omitted in pursuance of a law of the United States, or in violation of the Constitution of the United States. Manifestly they were not.

In considering this case one naturally compares it with the case in which Judge DURELL by his order set up a state government. There is one very obvious difference in the cases. The forms of judicial propriety were wholly wanting in the Louisiana case. In other particulars they rightfully may be classed together.

RECENT AMERICAN DECISIONS.

Supreme Court of Ohio.

JOHN G. HOLZWORTH ET AL. *v* KOCH ET AL.

An agreement to forbear suit on a pre-existing debt is a sufficient consideration for a note given therefor; and an agreement so to forbear until the maturity of the note will be presumed, in the absence of proof to the contrary.

Partial failure of consideration is no bar to an action on a promissory note, but